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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/605,754	10/23/2003	Joseph B. Richey II	12873/04666	2753

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EXAMINER

FLYNN, AMANDA R

ART UNIT	PAPER NUMBER
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3743

DATE MAILED: 05/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/605,754

Applicant(s)

RICHEY ET AL.

Examiner

Amanda R. Flynn

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 08 March 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 October 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 8 Mar 04.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Priority*

1. Applicant's claim of domestic priority to Application Number 09/952,763 is acknowledged.

### *Oath/Declaration*

2. Though not required, a new Declaration is requested, clearly claiming benefit to Application Number 09/952,763.

### *Claim Objections*

3. Claims 2, 6, 8, 11 and 17 are objected to because of the following informalities:

In claim 2, at line 2, the phrase "the amount of said oxygen" lacks proper antecedent basis. It appears that this phrase should be replaced with --the amount of oxygen--. An identical problem occurs in claim 8.

In claim 6, at line 6, the word "being" is misspelled (as "beig"). Appropriate correction is required.

In claim 6, at line 11, it is suggested that a hyphen be placed between "oxygen" and "enriched" for consistency.

In claim 11, at line 4, the phrase "said oxygen product storage tank" lacks proper antecedent basis. It appears that this phrase should be replaced with --said high pressure storage tank--.

In claim 17, at line 2, the phrase "said storage tank" lacks proper antecedent basis. It appears that this phrase should be replaced with --said high pressure storage tank--.

### *Double Patenting*

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-24 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-26 of U.S. Patent No. 5,988,165 in view of U.S. Patent Number 5,823,186 to Rossen et al.

Although the conflicting claims are not identical, they are not patentably distinct from each other because both claim an apparatus for supplying oxygen-enriched gas to a patient and to a high pressure storage tank, comprising: a low pressure oxygen-enriched gas patient flow line (fully capable of handling pressures of 3-10 psi) for use by a patient; a separate moderate

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pressure, oxygen-enriched gas buffer flow line (fully capable of handling pressures of 12-22 psi) operatively connected to a buffer tank; said moderate pressure being greater than said low pressure; said patient flow line and said buffer tank flow line being prioritized so as to continuously supply said oxygen-enriched gas for use by a patient; a compressor operated by a power source other than said oxygen-enriched gas, said buffer tank solely and operatively connected to said compressor; said compressor being capable of compressing said oxygen-enriched gas to a high pressure; and a high pressure storage tank for portable storage of said high pressure oxygen-enriched gas. Patent Number 5,988,165 does not explicitly disclose that the compressor used in the ventilator is a "radial" compressor.

Rossen et al. disclose such a radial compressor (element 4, col. 1, last two lines). The references are analogous since they are from the same field of endeavor, specifically, the respiratory arts.

At the time the invention was made, it would have been obvious to one skilled in the art to have provided the apparatus disclosed by Patent Number 5,988,165 with a radial compressor, as taught by Rossen et al., as radial compressor arrangements are known interchangeable mechanical equivalents with other compressors used in ventilators. Therefore, it would have been obvious to combine the references to obtain the instant claimed invention.

Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

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*Conclusion*

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The cited art discloses systems having features common with the instant invention.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amanda R. Flynn whose telephone number is 703-306-4056. The examiner can normally be reached on Monday-Thursday, 8:30 - 6:00 and alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry A. Bennett can be reached on 703-308-0101. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Amanda R. Flynn  
Examiner  
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